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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RIGOBERTO MARTINEZ, Defendant and Appellant.	B214587 (Los Angeles County Super. Ct. No. BA304974)

APPEAL from a judgment of the Superior Court of Los Angeles County. William R. Pounders, Judge. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

By amended information filed August 26, 2008, the Los Angeles County District Attorney charged appellant Rigoberto Martinez and codefendants Bryan Zambrano (Zambrano) and Judith Ann Figueroa (Figueroa) with the attempted willful, deliberate, and premeditated murder of Rosalio Velasquez (Velasquez). (Pen. Code, §§ 187, subd. (a); 664, subd. (a).[1]) The information further alleged that a principal to the offense personally used and intentionally discharged a firearm that proximately caused great bodily injury to Velasquez (§ 12022.53, subds. (b)-(e)) and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A).)

Following the jury trial, the trial court declared a mistrial when the jury announced that it was hopelessly deadlocked.

Appellant's retrial was severed from that of Zambrano[2] and Figueroa.

A jury convicted appellant of attempted willful, deliberate, and premeditated murder and determined that all of the attendant allegations were true. The trial court sentenced appellant to state prison for life for attempted murder, plus 25 years to life for the great bodily injury firearm enhancement. The trial court then imposed, and stayed, concurrent terms of the remaining enhancements

Appellant timely filed a notice of appeal, arguing: (1) Appellant's conviction for aiding and abetting premeditated and deliberated attempted murder must be reversed because there was insufficient evidence that he had the specific intent to commit that crime or to aid and abet an assault with a firearm. (2) There was insufficient evidence of premeditation and deliberation. (3) The trial court erroneously gave the jury the kill zone instruction in this single-charged victim case. (4) The trial court erred by not relating the jury instruction concerning premeditation and deliberation to the natural and probable consequences instruction.

We find no error and affirm the judgment.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 Zambrano's separate appeal is pending before this court in case number B217874.

FACTUAL BACKGROUND

I. *Prosecution*

A. The Shooting

Just before 7:00 p.m. on June 25, 2006, Velasquez (approximately 60 years old), was walking to his car on Mariposa Avenue when he saw a group of 25 to 35 Hispanic men at the intersection of Olympic and Mariposa. As Velasquez continued toward his car, he observed two men, appellant and Zambrano, approach him from the opposite direction. Appellant had a tattoo on the side of his neck. Velasquez heard seven shots fired in quick succession. A bullet fired by appellant or Zambrano hit Velasquez in the side of the neck, and Velasquez fell to the ground. Velasquez heard appellant or Zambrano say "Playboy." Appellant and Zambrano then ran.

Officer Matthew McNulty of the Los Angeles Police Department was on duty that evening when a "shots fired" call came over the radio. He responded to the location at Olympic and Mariposa. When he arrived, he saw a crowd of people and Velasquez lying against a block wall, bleeding from his neck. Officer McNulty's partner interviewed witnesses at the scene. Officer McNulty used their observations of the incident to issue a radio broadcast describing three suspects, two male Hispanics and one female, the getaway vehicle, and the vehicle's license plate number. Officer McNulty recovered six .22 caliber shell casings in the street.

The same night, Los Angeles Police Department Detective Luis Corona responded to the intersection of Tweedy and Long Beach Boulevards in the City of South Gate, where a South Gate police officer had pulled over a vehicle that matched the description and license plate of the crime broadcast. Police officers took the driver, Figueroa, into custody, and then went to her house on Nebraska Avenue in South Gate, where they arrested several individuals, including appellant.

Los Angeles Police Department Detective Robert Palacios went to the hospital the same night to interview Velasquez. Though in pain, Velasquez recalled that one of the two men he saw approaching him on Mariposa had a "blurry shadow" or mark on the side

of his neck. Detective Palacios was advised by another officer that the police had suspects in custody. Based on Velasquez's description, police checked and found the tattoo of a rabbit's head on the side of appellant's neck, just below his ear.

Later that night, Detective Palacios interviewed appellant at the police station. After initially maintaining that he had been at Figueroa's house alone all day and not in the area of the shooting, he stated: "There was a buncha fools over there. You know?" "It was a big ass crowd, man." "[T]here was a lot of people right there that night." Detective Palacios asked appellant how a 60-year-old man with no gang connections, and with no sign of an attempted robbery, had come to be shot earlier that evening. Appellant replied: "Like I said, it might have been an accident. [¶] . . . [¶] . . . If he [Velasquez] did [get shot], it, it was an accident."

The following exchange subsequently occurred:

"[Appellant]: All these witnesses. Come on, man. And you're still asking me if I was there?

"[Detective Palacios]: Yeah, I want you to tell me.

"[Appellant]: Of course you know I was there, man. Come on, man."

"[Detective Palacios]: [Y]ou were there and you knew how it transpired.

"[Appellant]: Yeah, but I ain't gonna say nothing."

"[Detective Palacios]: . . . But you knew there were shots fired and the reason the shots were fired. You know that. You know that and that's what I want to know.

"[Appellant]: There was a bunch of people man right there.

"[Detective Palacios]: Exactly. So why were the shots fired? You don't have to tell me it was him. Just why, why were the shots fired in the first place?"

"[Appellant]: 'Cause we thought it was MS right there you know. [¶] . . . [¶]

"[Detective Palacios]: How did you, why did you think they were MS? Were there MS guys there?

"[Appellant]: Everybody started running you know. And they were just throwing looks and shit. I didn't even know, you know?

"[Detective Palacios]: Did, didn't, didn't MS recently shoot up, at Playboys, about a couple weeks ago? Two or three weeks?

"[Appellant]: I guess. Uh-huh. And then, yeah. And one homie got hit I think. [¶] . . . [¶]

"[Detective Palacios]: . . . The incident.

"[Appellant]: Okay, the incident, we just passed by and that's it[.] You know, we passed by and saw 'em. That's it. I don't know. We passed by and we saw 'em and shit, you know?"

B. Events Prior to and Following the Shooting

Darla Solis (Solis) met appellant for the first time the night he slept over at the home of her mother, Figueroa. It was probably Saturday, June 24, 2006. Appellant arrived at the house that evening with Figueroa and Zambrano. Solis went to the house with her boyfriend, David Zambrano (David), Zambrano's brother.

When Solis got up on Sunday morning, Zambrano and appellant were still there. The group made plans to attend a carnival at Normandie Park, just west of downtown Los Angeles. The group included Solis, David, Zambrano, Figueroa, and appellant.

They drove to Normandie Park in two cars: Solis, Solis's daughter, and David were in Solis's car; Zambrano and appellant rode with Figueroa in her car. When they arrived at the carnival, they all walked around together for awhile and then split up. Zambrano and appellant went off on their own. At some point, the group reconnected and decided to adjourn to Zambrano's house. They left the carnival with the same passengers in their respective vehicles.

Solis's vehicle became separated from Figueroa's vehicle while they were exiting the carnival area, but Solis and her companions continued on to Zambrano's house. Appellant, Figueroa, and Zambrano arrived at Zambrano's house later. When asked about the time interval, Solis originally said it was 20 minutes before the three arrived; she later changed her estimate to 10 or 15 minutes, then to five minutes. At trial, Solis claimed that the three arrived about five minutes later.

The group remained together at Zambrano's house for about 10 or 15 minutes, then Figueroa left "because there were some problems at [her] house." Solis, Solis's daughter, David, Zambrano, and appellant got into Solis's car and started back to Figueroa's house. They stayed there for a few minutes before Solis, David, Zambrano, and appellant went to McDonald's.

On their way back from McDonald's, Solis went to the intersection of Long Beach and Tweedy Boulevards, where Figueroa had been stopped by police. Figueroa was taken into custody. Between approximately 9:00 p.m. and 10:00 p.m. that night, appellant, Solis, and Zambrano arrived at Figueroa's house. Appellant, Solis, Solis's sister, David, and Zambrano were taken into custody.

C. Gang Evidence

At trial, two Los Angeles police officers testified about prior police encounters with appellant. In December 2004, Officer Newlin Driller took appellant into custody after observing him spray painting a wall with "Playboys" gang graffiti near the corner of Pico Boulevard and Fedora Street. On October 5, 2005, Officer Daniel Cota observed appellant in the company of three known Playboy gang members outside the residence at 1326 Catalina Street, a known gang hangout. The following February, Officer Cota observed appellant in front of a liquor store at 2698 Pico Boulevard. The owner of the store had recorded it as a "nuisance location" in regards to the Playboy gang in an effort to stop the gang loitering in and near his store. On another occasion, Officer Cota pursued appellant to an abandoned residence that had been heavily vandalized with Playboy gang graffiti.

Officer Hector Marquez, an expert on gangs, had dealt with both the Playboys and Mara Salvatrucha (MS) gang members. He understood that there were approximately 350 documented Playboy gang members in Los Angeles. He had executed search warrants at Playboy locations and investigated crimes in which Playboy members were suspects.

Normandie Park was a popular spot for gang members to play basketball. Playboy territory was surrounded on all sides by rival gangs, including MS to the north. A portion of MS turf was a "no-man's land."

The Playboys have a common gang sign. A photograph of Zambrano depicted him throwing the Playboy sign. He posed for Officer Marquez in the picture, to show that he was a member of the gang. Another photograph showed Zambrano displaying the Playboys sign and wearing a Playboy charm. A photograph of appellant showed him displaying the Playboy sign.

The Playboys' primary activities consist of murder, attempted murder, robbery, drive-by shooting, assault with a deadly weapon, sales and possession of narcotics, and vandalism.

Officer Marquez knew appellant from over 20 personal contacts within the Playboys territory. The majority of those contacts were consensual. Often, he would just drive up to appellant to see how he was doing and determine whether he was staying out of trouble. Officer Marquez would warn appellant that he would be ticketed if he was out past the 10:00 p.m. curfew.

It was common, but not mandatory, for gang members to get tattoos. Tattoos can only be worn if earned, so they are a symbol of pride. They were becoming rarer as gang members were getting smarter. Zambrano did not have a Playboy tattoo. He told Officer Marquez that he would never mark up his body that way. When tattoos are worn, they are worn proudly above the neckline or with short-sleeved shirts or tank tops. Officer Marquez would not expect a nongang member to get a gang tattoo. Appellant had a Playboys tattoo behind his ear. He also had "Playboys" written across the back of his neck. Officer Marquez believed that appellant was a Playboys gang member because of his tattoos and his admissions of membership.

In Officer Marquez's opinion, if, in June 2006, three gang members went to a carnival and Normandie Park and then, with a female member driving, proceeded to Mariposa near Olympic, and, believing there were MS members standing there, fired

numerous shots toward the group and a 60-year-old man ended up getting shot in the neck and the word "Playboys" was heard and the gang members fled, the crime was committed for the benefit of or at the direction of or in association with a criminal street gang. Some of the factors that weighed into his conclusion included: They were in rival gang territory, trying to claim it; they yelled "Playboys"; they used a firearm; and they showed that they had three people there. Officer Marquez had no personal knowledge of the incident.

In June 2006 and the preceding months, Officer Marquez was aware of shootings and a murder where MS members were involved. He believed that the shooting at Mariposa and Olympic might have been in retaliation for those crimes. Officer Marquez and Detective Palacio had seen MS gang members at the intersection of Mariposa and Olympic.

II. *Defense*

Appellant testified on his own behalf. He claimed that he had nothing to do with the shooting on Mariposa, and only learned the facts surrounding the incident from Zambrano when they were at the police station waiting to be interviewed. According to appellant, at around 5:00 or 6:00 p.m. on June 25, 2006, he was drinking beer purchased by Zambrano. He had met Zambrano a week earlier when Zambrano came up to him in the liquor store and at the corner of Pico and Fedora and introduced himself.

Appellant went to Figueroa's house on the evening of June 25, 2006, because he met her the previous day at the Normandie Park carnival. She came up to him at the carnival, introduced herself, and they enjoyed the carnival together. They never discussed gang membership. They stayed at the carnival until 1:00 a.m. or 2:00 a.m., when it ended, at which point Figueroa took him home with her to South Gate, where he spent the night. He remarked that she looked younger then.

When he got up the next day, it was late and no one else was present. He stayed in the living room and waited for Figueroa to get home.

Appellant admitted that he was a Playboys gang member. He claimed that he did not hang around the Playboys much anymore, that it was something he "did when [he] was younger." Appellant did not learn that Zambrano was a gang member until Zambrano admitted that he had been involved in the shooting on Mariposa. That is also when appellant learned that Figueroa was a member of the Playboys gang.

DISCUSSION

I. *Sufficient Evidence Supports Appellant's Conviction for Aiding and Abetting Attempted Murder*

A. Standard of Review

To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

B. Law Regarding Aiding and Abetting

To prove the crime of attempted murder, the People must establish that appellant, with malice aforethought, formed the specific intent to kill and committed a direct but

ineffectual act in the effort to kill. (§§ 664/187; CALJIC No. 8.66.) To prove that the attempted murder was willful, deliberate, and premeditated, the People also must prove that the attempted murder "was preceded and accompanied by a clear, deliberate intent to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation." (§§ 664/189; CALJIC No. 8.67.)

Section 31 provides that "[a]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission, . . . are principals in any crime so committed." An accomplice to a crime, that is, an aider and abettor, is a person who, acting with (1) knowledge of the unlawful purpose of the perpetrator; (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense; and (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*).)

"Under California law, a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a 'natural and probable consequence' of the crime originally aided and abetted. To convict a defendant of a nontarget crime as an accomplice under the 'natural and probable consequences' doctrine, the jury must find that, with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a 'natural and probable consequence' of the target crime that the defendant assisted or encouraged." (*Prettyman*, *supra*, 14 Cal.4th at p. 254.)

Among the factors that may be considered in determining if someone aided and abetted a crime are presence at the crime scene, companionship with the actual perpetrator, conduct before and after the offense, and flight from the scene. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5.) Liability as an aider and abettor does not require evidence of a prior agreement with the actual perpetrator or express communication regarding the actual perpetrator's criminal purpose. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531–532.) Rather, the intent to aid and abet may be formed either prior to or during the commission of the offense. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1039.) And, the actual perpetrator need not be charged with a crime or even identified. (*People v. Bundte* (1948) 87 Cal.App.2d 735, 748–749.)

C. Analysis

Ample evidence supports appellant's conviction of aiding and abetting attempted murder. The facts presented at trial established that appellant was a long-time member of the Playboys gang. He had gang tattoos, including a Playboys symbol behind his ear and the word "Playboys" written on his neck. Perhaps most importantly, appellant admitted that he was a member of the gang.

The evidence also established that Zambrano was a Playboys gang member and that Figueroa was, or had been, a member of the gang.

The Playboys gang counts among its primary activities attempted murders, drive-by shootings, and assaults with deadly weapons. In the months prior to this crime, there had been hostilities between the Playboys gang and the rival MS gang, as the MS gang had been involved in shootings and murders. Appellant, Figueroa, and Zambrano went together to the scene of the crime, territory of the rival MS gang, and one of them yelled "Playboys" as shots were fired and the victim was struck.[3] Taken together, this evidence supports appellant's conviction.

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[3] Appellant claims that there is no evidence that he shouted a gang name or said anything at the time of the shooting. The jury was free to draw this reasonable conclusion based on the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Appellant argues that his presence at the crime scene by itself is insufficient to sustain his conviction. While that legal proposition may be true, appellant ignores the other evidence that supports his conviction for aiding and abetting. As set forth above, appellant's companions were fellow Playboys gang members. They entered a rival gang's territory and, immediately after they entered that area, a shooting occurred and someone yelled "Playboys."

Appellant also argues that there is no evidence that he had a preexisting intent to commit or to aid and abet the commission of an assault with a firearm. The evidence indicates otherwise. He was present at the scene of the crime. As set forth above, he is a member of the Playboys gang and was with fellow gang members at the time of the shooting. And, he knew that he was entering rival gang territory at the time of the shooting. In fact, he believed that he was in the presence of rival MS gang members. Against the backdrop of the history of a recent shooting by MS gang members against the Playboys, of which appellant was well-aware, this evidence is sufficient to support the jury's finding conviction for aiding and abetting attempted murder.

II. *Sufficient Evidence Supports the Jury's Finding of Premeditation and Deliberation*

A. Standard of Review

We review the jury's finding of premeditation and deliberation for substantial evidence. (*People v. Burney* (2009) 47 Cal.4th 203, 235.)

B. Analysis

Section 664, subdivision (a) provides in pertinent part: "If the crime attempted is punishable by imprisonment in the state prison, the person guilty of the attempt shall be punished by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. However, if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. . . . The additional term provided in this section for attempted

willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact."

"'[P]remeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' (CALJIC No. 8.20 (5th ed. 1988), quoted with approval in *People v. Perez* (1992) 2 Cal.4th 1117, 1123 [9 Cal.Rptr.2d 577, 831 P.2d 1159].)" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) However, "[t]he process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .' (*People v. Thomas* (1945) 25 Cal.2d 880, 900 [156 P.2d 7]; accord, *People v. Perez*, *supra*, 2 Cal.4th at p. 1127.)" (*Ibid.*; see also *People v. Stitely* (2005) 35 Cal.4th 514, 543 ["An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.] However, the requisite reflection need not span a specific or extended period of time"].)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), the California Supreme Court established a tripartite test for deciding whether there is sufficient evidence to support a finding of premeditation and deliberation. (*People v. Sanchez* (1995) 12 Cal.4th 1, 32, overruled in part on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The three factors in the *Anderson* test are: "(1) planning activity; (2) motive (established by a prior relationship and/or conduct with the victim); and (3) manner of killing. [Citations.] '[T]his court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3).' (*Anderson*, *supra*, 70 Cal.2d at p. 27.)" (*People v. Sanchez*, *supra*, 12 Cal.4th at p. 32.)

In *People v. Sanchez, supra*, 12 Cal.4th 1, the Supreme Court stated that "the *Anderson* factors do not establish normative rules, but instead provide guidelines for our analysis. In *People v. Thomas* (1992) 2 Cal.4th 489, 517 [7 Cal.Rptr.2d 199, 828 P.2d 101] we observed: 'The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law in any way.'" (*Id*. at p. 32.)

"In identifying categories of evidence bearing on premeditation and deliberation, *Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation. . . . The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*People v. Perez, supra*, 2 Cal.4th at p. 1125.) Nevertheless, although the *Anderson* factors do not have to be present in any "'special combination'" or accorded a "'particular weight'" (*People v. Sanchez, supra*, 12 Cal.4th at p. 33), the factors do guide our determination of whether the murder occurred as a "result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. [Citation.]" (*People v. Perez, supra*, 2 Cal.4th at p. 1125; *People v. Hovarter* (2008) 44 Cal.4th 983, 1019).

The record here contains sufficient evidence from which a reasonable juror could find that the attempted murder of Velasquez was the product of thought and reflection—premeditation and deliberation—rather than unconsidered or rash impulse. Appellant and his confederate gang members travelled into rival gang territory to seek revenge for earlier hostilities between the Playboys and the MS gang. Multiple shots were fired in a manner likely to cause great bodily injury or death. The fact that there is no direct evidence of murder planning does not compel a different conclusion.

In urging us to reverse, appellant relies heavily upon *United States v. Begay* (9th Cir. 2009) 567 F.3d 540 (*Begay*). Aside from the fact that federal cases are not binding on this court on questions of federal constitutional law (*People v. Williams* (1997) 16 Cal.4th 153, 190), the opinion in *Begay* was vacated and the case was set for rehearing, en banc, after appellant filed his opening brief. (*United States v. Begay* (9th Cir. 2010) 591 F.3d 1180.)

III. *Kill Zone Instructions Were not Prejudicial*

A. Procedural Background

According to the amended information, appellant was charged with the attempted murder of Velasquez.

In his opening statement, the prosecutor informed the jury that "[t]here [was] one count, and that is the attempted murder of . . . Velasquez [who] was shot in the neck on June 25th, 2006." He then went on to highlight the evidence that would be presented at trial, including evidence of appellant's gang ties. Later, the district attorney told the jurors that they would be viewing the videotape of appellant's interview with Detective Palacios on the night of the shooting. In fact, the district attorney pointed out appellant's admissions during that interview, such as his statement that there were "a lot of people [on the corner] that night" and that Velasquez getting shot "'might have been . . . an accident.'" And, the prosecutor stated that appellant's "motivation for this particular shooting" was his belief that a rival gang, MS, was on the corner that night.

The prosecutor also informed the jury that the videotape would reveal a discussion between Detective Palacios and appellant about "a shooting where MS had shot Playboys a few weeks earlier, and [appellant] acknowledge[d] being aware of that." The district attorney then indicated to the jury that it would hear evidence "about how retaliation is also a big part of the gang culture."

The district attorney summed up his opening statement as follows: "And you will hear that it's [appellant's] own words that will tell you and will show you that he is—had the motivation to do this particular crime, this shooting, and he was present at the time,

and that the people that were there at that street corner were believed to be MS members by [appellant]."

Following the presentation of evidence, the district attorney offered his closing argument. He repeated the charge against appellant: "[o]ne count. That's the attempted murder of . . . Velasquez, Mr. Velasquez shot in the neck on June 25th of 2006." He then reiterated the gang allegation against appellant, namely that "this shooting was committed for the benefit of, at the direction of or in association with a criminal street gang." And later, the district attorney argued appellant's motive in the crime, namely that he believed that there were MS gang members at the location of the shooting and that the Playboys and the MS were in a war.

Last the prosecutor explained to the jury how it could convict appellant of attempted murder.

Then the trial court gave the jury instructions. As is relevant to this discussion, it instructed the jury on intent and on the law of attempted murder. The trial court stated, inter alia: "In order to prove attempted murder, each of the following elements must be proved[:] [¶] 1. A direct but ineffectual act was done by one person towards killing another human being; and [¶] 2. The person committing the act harbored express malice aforethought." After, over appellant's objection, it instructed the jury on a kill zone theory: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a zone of risk is an issue to be decided by you."

The jury found appellant guilty of attempted murder, and also found that the crime "was committed for the benefit of, at the direction of or in association with a criminal

street gang with the specific intent to promote, further or assist in criminal conduct by gang members."

B. Standard of Review

"No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art VI, § 13.) "A miscarriage of justice occurs only when it is reasonably probable that the jury would have reached a result more favorable to the appellant absent the error. [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277–278.)

"A trial court must instruct the jury 'on the law applicable to each particular case.' [Citations.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) A "claim that a court failed to properly instruct on the applicable principles of law is reviewed de novo." (*Ibid.*)

In determining whether error has been committed, we must consider the instructions as a whole. (*People v. Martin, supra*, 78 Cal.App.4th at p. 1111.) In other words, "we are mindful that '"a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."'" (*People v. Frye* (1998) 18 Cal.4th 894, 957, overruled in part on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.)

C. Analysis

Appellant contends that pursuant to *People v. Stone* (2009) 46 Cal.4th 131 (*Stone*), his conviction must be reversed because the trial court erroneously gave a kill zone instruction in this single charged victim case.

In *Stone*, the defendant "was charged with and convicted of a single count of attempted murder for firing a single shot at a group of 10 people." (*Stone, supra,* 46

Cal.4th at p. 136.) The trial court gave a modified version of the kill zone instruction. (*Id*. at p. 138.) "The Court of Appeal found that the [trial] court erred in giving this instruction," and the California Supreme Court agreed. (*Ibid*.) "The kill zone theory simply [did] not fit the charge or facts of [that] case. That theory addresses the question of whether a defendant charged with the murder or attempted murder of an intended target can *also* be convicted of attempting to murder other, nontargeted, persons. Here, defendant was charged with but a single count of attempted murder. He was not charged with 10 attempted murders, one for each member of the group at which he shot. As the Court of Appeal explained, 'There was no evidence here that [defendant] used a means to kill the named victim, Joel F., that inevitably would result in the death of other victims within a zone of danger. [Defendant] was charged only with the attempted murder of Joel F. and not with the attempted murder of others in the group on which [defendant] fired his gun.'" (*Ibid*.)

While the Supreme Court found that the trial court had erred, it noted that this error was "not necessarily prejudicial by itself." (*Stone, supra*, 46 Cal.4th at p. 138.) The Supreme Court then went on to review what the Court of Appeal found prejudicial, namely "that the instructions, combined with the prosecutor's argument, might have caused the jury to believe it could convict defendant of attempted murder if it found an intent to kill someone, even if not specifically Joel F." (*Id*. at p. 139.) The Supreme Court noted that this conclusion "may have been based, at least in part, on the understanding that attempted murder requires the intent to kill a particular person." (*Ibid*.) That conclusion, our high court found, was erroneous; "a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind." (*Id*. at p. 140; see also *People v. Perez* (2010) 50 Cal.4th 222, 230.) That legal principle proved to be problematic in *Stone* because "the information [in that case] specifically alleged that defendant intended to kill Joel F.," but the prosecution "could not prove that defendant targeted a specific person rather than simply someone within the group. In hindsight, it would no doubt have been better had the case been charged

differently. . . . If the defendant is accused of attempted murder of someone, although not necessarily a specific person, it would be sufficient to allege enough facts to give notice of the incident referred to and that the defendant is charged with attempted murder." (*Stone*, at p. 141.)

Applying *Stone* to the instant case, we agree with appellant that the trial court erred in giving the kill zone instruction. But, that error was not prejudicial. (*Chapman v. California* (1967) 386 U.S. 18, 26; *People v. Watson* (1956) 46 Cal.2d 818, 836.) While the information specifically alleged that appellant intended to kill Velasquez, the People proved otherwise at trial. The evidence established that appellant did not know Velasquez. In other words, the People proved that appellant intended to kill someone, not necessarily Velasquez. While it might have been better had the information so alleged (see, e.g., *People v. Perez*, *supra*, 50 Cal.4th at p. 234, fn. 8), that variance does not compel reversal. (*Stone*, *supra*, 46 Cal.4th at pp. 141–142; § 956 ["When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, or of the place where the offense was committed, or of the property involved in its commission, is not material"; *People v. Pitts* (1990) 223 Cal.App.3d 606, 908, fn. 77, superseded by statute on other grounds as stated in *People v. Levesque* (1995) 35 Cal.App.4th 530, 537 ["Section 956 states a rule of pleading; the errors described therein are not fatal because the accused receives notice of the particulars of the offense from the preliminary hearing transcript"].)

Moreover, throughout his opening statement and closing argument, the district attorney never states that appellant knew Velasquez or specifically intended to shoot him. Rather, a review of the entire transcript reveals what the prosecutor was proving—that appellant shot (or aided and abetted Zambrano when he fired his weapon) at the crowd on the corner to benefit the Playboys, probably in retaliation for the MS shooting of a Playboys member a few weeks earlier. (*People v. Kelly* (1992) 1 Cal.4th 495, 526–527 [closing arguments considered in evaluating prejudice from erroneous jury instruction].)

Finally, the jury received several instructions regarding the charged offense of attempted murder. It then convicted appellant of that crime and found true the gang allegation.

Considering the instructions as a whole, the evidence presented at trial, the arguments of counsel, and the verdict form, we conclude it is not reasonably likely that the jury convicted appellant of attempted murder based upon a kill zone theory.[4] (See *People v. Frye, supra,* 18 Cal.4th at p. 958.)

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[4] It follows that we reject appellant's argument based upon *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*).

In *Guiton, supra,* 4 Cal.4th at pages 1121 to 1130, the California Supreme Court distinguished error caused by verdicts based on legally inadequate theories and those based on an inadequacy of proof that is purely factual. The *Guiton* court adopted the rule of *Griffin v. United States* (1991) 502 U.S. 46 (*Griffin*) for analyzing the prejudicial effect of error that occurs when the jury is given the option of relying on a factually inadequate theory. (*Guiton,* at p. 1128.) At the same time, the *Guiton* court reaffirmed the use of the rule it established in *People v. Green* (1980) 27 Cal.3d 1 (*Green*) for cases in which a legally inadequate theory is presented to the jury. (*Guiton,* at pp. 1128–1129.) *Green* held that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*Green,* at p. 69, disapproved on another point in *People v. Martinez* (1999) 20 Cal.4th 225, 239 & *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.)

Guiton stated that reversal is the norm under the *Green* rule because the appellate court is generally unable to determine which of the People's theories was the basis of the jury's verdict. (*Guiton, supra,* 4 Cal.4th at pp. 1129, 1130.) The court pointed out, however, that the record in any given case might affirmatively indicate that reversal is not appropriate. (*Id.* at p. 1129.) It reasoned that one way of finding harmless error was to determine from other portions of the verdict that the jury found the defendant guilty on a proper theory. (*Ibid.*)

Appellant argues that "[t]he jury here likely convicted [him] on the 'kill zone' theory." Because the trial court erroneously instructed the jury on the kill zone theory, and there was no evidentiary basis for the kill zone theory, appellant argues, pursuant to *Guiton,* that his conviction must be reversed. We disagree. Rather, as set forth above, it is not likely that the jury convicted appellant on a kill zone theory. Thus there is an evidentiary basis under which appellant's conviction stands and reversal is improper.

IV. *Jury Instructions Relating to Premeditation and Deliberation and Natural and Probable Consequences Were Proper*

A. Background

The trial court gave the following instructions to the jury:

"One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted.

"In order to find [appellant] guilty of the crime of Attempted Murder under this theory, you must be satisfied beyond a reasonable doubt that:

"1. The crime of Assault with a Firearm was committed;

"2. That [appellant] aided and abetted that crime;

"3. That a co-principal in that crime committed the crime of Attempted Murder; and

"4. The crime of Attempted Murder was a natural and probable consequence of the commission of the crime of Assault with a Firearm.

"In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not on what [appellant] actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen."

The trial court also instructed the jury on the law of attempted murder. And, the trial court instructed the jury on premeditation, stating: "It is also alleged that the crime attempted was willful, deliberate, and premeditated murder. If you find [appellant] guilty of attempted murder, you must determine whether this allegation is true or not true."

B. Analysis

Appellant argues that the trial court erred when it instructed the jury on the natural and probable consequences of attempted murder but not of the premeditated and

deliberated murder. Relying exclusively upon *People v. Hart* (2009) 176 Cal.App.4th 662 (*Hart*), a recent opinion from the Third Appellate District, appellant contends that the trial court erred by not relating "the instruction concerning premeditation and deliberation to the natural and probable consequences instruction."

In *Hart*, defendant Hart and an accomplice, Rayford, attempted an armed robbery of a liquor store. Hart shot the owner of the liquor store, and he and Rayford were convicted of, inter alia, attempted robbery and attempted premeditated murder. (*Hart, supra*, 176 Cal.App.4th at p. 665.) The jury was given instructions that it could find both men guilty of attempted murder if it found that attempted murder was a natural and probable consequence of attempted robbery. (*Id*. at p. 669.) On appeal, Rayford argued that the instructions erroneously precluded the jury from finding him guilty of unpremeditated attempted murder. (*Id*. at p. 668.)

The *Hart* court found that the instructions were insufficient. (*Hart, supra*, 176 Cal.App.4th at pp. 668, 673.) The jury was not informed that in order to find the accomplice guilty of attempted premeditated murder, "it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery." (*Id*. at p. 673.) The evidence in *Hart* could have supported a finding that attempted unpremeditated murder was a natural and probable consequence of the attempted robbery, but that attempted premeditated murder was not. (*Id*. at p. 672.) The court reasoned: "The trial court properly instructed the jury concerning premeditation and deliberation, as it relates to attempted murder, stating, in essence, that it is a subjective state of mind. However, in determining whether the premeditation and deliberation element was a natural and probable consequence of the attempted murder, the jury does not look at the aider and abettor's subjective state of mind. Therefore, the general instruction concerning the premeditation and deliberation element of attempted murder did not properly inform the jury concerning its duty with respect to the natural and probable consequences doctrine." (*Id*. at p. 673.)

Hart concluded that, when a defendant's liability for attempted first degree murder is the result of his being an accomplice under a natural and probable consequences theory, the trial court has a sua sponte duty to instruct the jury that it must determine whether premeditation and deliberation, as it relates to the attempted murder, is a natural and probable consequence of the target crime. (*Hart, supra,* 176 Cal.App.4th at p. 673.) Attempted premeditated murder is the functional equivalent of a greater offense than unpremeditated attempted murder, and if the trial court fails to so instruct, it leaves the jury with the erroneous impression that it may not find the aider and abettor less culpable than the principle. (*Id*. at pp. 672, 674.)

Assuming the jury applied the natural and probable consequences doctrine to appellant's case, and were we to follow *Hart*,[5] it is distinguishable because a finding of attempted premeditated murder was the only natural and probable consequence of the target crime (assault). In *Hart*, the target crime was an attempted robbery in which the weapon was incidental to the crime and might never have been fired by the coparticipant in the robbery. Here, appellant, Figueroa, and Zambrano drove by a crowd on a street corner in rival gang territory and one of them fired shots. Under these circumstances, the evidence supports a finding that a reasonable person in appellant's position would have known that attempted murder was likely to occur if nothing unusual intervened. It was not "theoretically possible for the jury to conclude that [appellant] premeditated the attempted murder but that such premeditation was not a natural and probable consequence of the [assault with a firearm]." (*Hart*, *supra*, 176 Cal.App.4th at p. 672.) Rather, in this case, the facts lead "ineluctably" to the conclusion that premeditated murder was the only natural and probable consequence of the assault charge. (*Ibid*.)

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5 "A decision of a Court of Appeal is not binding in the Courts of Appeal." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 498, p. 558.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD